

1814561 (Migration) [2022] AATA 1755 (29 April 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1814561
MEMBER:	Justine Clarke
DATE OF ORAL DECISION:	29 April 2022
DATE OF WRITTEN STATEMENT:	2 May 2022
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(1) of Schedule 2 to the Regulations • cl 820.221(1)(a) of Schedule 2 to the Regulations

Statement made on 02 May 2022 at 4:55pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – shared his financial resources – shared responsibility for housework – duration of marriage relationship – absence of sponsorship form – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65, 359

Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

Jayasinghe v MIMA [2006] FCA 1700

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made on 26 April 2018 by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. On 10 May 2017, the [applicant], who is a national of Vietnam, applied for the visa based on her relationship with her sponsor, [named]. At the time of application, the applicant was aged [age] years and the sponsor was aged [age] years. At the time of this decision, the applicant is aged [age] years and the sponsor is aged [age] years.
3. At the time of application, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant.
4. The applicant provided the Tribunal with a copy of the primary decision. The delegate assessed the application pursuant to cl 820.211(2), finding it to be the only subclause relevant to the applicant's circumstances. The delegate found that the applicant did not meet cl 820.211(2)(a) of Schedule 2 to the Regulations because the delegate considered that there was insufficient evidence to demonstrate that, at the time of application on 10 May 2017, the applicant satisfied the definition of either spouse under s 5F of the Act or de facto partner under s 5CB of the Act. The delegate noted that the only evidence provided was the application form, despite a subsequent request for further evidence being made on 23 March 2018, for which the Department received no response before the delegate making their decision on 26 April 2018. The decision was essentially a 'no evidence' decision. The delegate made no findings in respect of the time of decision criterion in cl 820.221(1).
5. On 18 May 2018, the applicant applied to the Tribunal for review of the refusal decision. The applicant was represented in relation to the review.
6. As no further evidence was submitted at the time of application or for a number of years thereafter, on 9 July 2021, the Tribunal wrote to the applicant, by way of the representative, to invite her to provide further evidence to support her claims that she and her claimed partner are in a spouse or de facto relationship. The letter was sent pursuant to s 359(2) of the Act and the Tribunal requested that the information be provided by 23 July 2021 and outlined the consequences of failing to respond or request an extension of time by that date.
7. On 23 July 2021, the applicant submitted some further evidence in support of the case.
8. The Tribunal's ability to list the matter for an in-person hearing was hindered by the disruption caused by the COVID-19 pandemic in Melbourne.
9. On 9 March 2022, the Tribunal wrote to the applicant, by way of the representative, inviting her to an in-person hearing on 7 April 2022.
10. On 30 March 2022, the representative filed a completed Response to Hearing form, stating that both the applicant and the sponsor would attend the scheduled hearing.
11. On 7 April 2022, the hearing had to be cancelled and postponed due to the ill health of the presiding Member.

12. On 29 April 2022, the applicant appeared, in person, before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, who also appeared in person. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The interpreter and the representative also attended the hearing in person.
13. At the conclusion of the hearing held on 29 April 2022, the Tribunal gave its decision on the review. The Tribunal concluded that the matter should be remitted for reconsideration. The following are the reasons for that decision.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The primary criteria to be satisfied at the time of application are set out in cl 820.211(1). This requires that the applicant is not the holder of a Subclass 771 (Transit) visa and that she meets one of the alternate requirements set out in cl 820.211(2), (5), (6), (7), (8) or (9).
15. The Tribunal has reviewed the applicant's movement records which also detail her visa status at various times. The Tribunal is satisfied that, at the time of application on 10 May 2017, she was not the holder of a Subclass 771 (Transit) visa. Therefore, the Tribunal finds that cl 820.211(1)(a) is met.
16. The subclause relevant to the applicant's circumstances is cl 820.211(2). Accordingly, in this case, the issue for determination is whether, at the time of application, the applicant and her sponsor were spouses for the purposes of the Act.
17. As Middleton J stated in *Jayasinghe v MIMA* [2006] FCA 1700 at [35]:
 18. Evidence of events subsequent to the visa application is relevant if it 'tends logically to show the existence or non-existence of facts relevant to the issue to be determined': see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 160 per Deane J. The Tribunal must consider all relevant evidence, which may include evidence of events subsequent to the date of application insofar as it assists in the task of determining whether the appellant and the sponsor were in a marriage relationship at the time of the application. The question of whether particular evidence is relevant and the weight it is to be given is clearly a matter for the Tribunal.
19. In deciding this matter, the Tribunal has also had regard to evidence of events subsequent to the date of the visa application.
20. In the circumstances of this case, the Tribunal considers that it is appropriate to make findings about cl 802.221 (a time of decision criterion) as well.
21. Clause 820.221(1)(a) provides:
 - (1) In the case of an applicant referred to in subclause 820.211(2), (5), (6), (7), (8) or (9), the applicant either:
 - (a) continues to meet the requirements of the applicable subclause[.]

Whether the parties are in a spouse or de facto relationship

22. Clauses 820.211(2)(a) and 820.221 respectively require that, at the time the visa application was made and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen.

23. The applicant claims to be the spouse of the sponsor. In the record of responses for the application for migration to Australia by a partner, it was claimed that the sponsor is an Australian citizen. No corroborating evidence has been submitted. Notwithstanding, the Tribunal notes that the movement records for the sponsor, a copy of which is on the Tribunal's file, records that the sponsor is 'Aus PPT (Onshore)'. From the evidence before it, the Tribunal is satisfied that the sponsor is either an Australian citizen or an Australian permanent resident.
24. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)–(d).
25. In forming an opinion about these matters, regard must be had to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

26. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. In the record of responses for the application for migration to Australia by a partner, it was claimed that the parties married [in] April 2017. At the hearing, the sponsor told the Tribunal that they had had a civil marriage ceremony in Richmond, Victoria.
27. When the matter was before the Department, the delegate accepted that the parties were in a married relationship. So, it may be that a copy of the marriage certificate was submitted to the Department at that time.
28. In this review, the applicant has not provided a copy of her marriage certificate. However, she submitted a number of photographs of the parties' civil marriage, including a photograph of her holding the completed 'decorative' Certificate of Marriage with the sponsor and a man who appears to be the celebrant.
29. On the evidence, the Tribunal is satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Regulation 1.15A(3) matters

30. Regulation 1.15A(3) provides relevant factors for determining whether the spousal relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the person's commitment to each other.
31. In considering these issues, the Tribunal has had regard to all the documents on the Department's file, the Tribunal's file and, importantly, the oral evidence given at the hearing.

32. *The financial aspects of the relationship*

33. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.
34. Both the applicant and the sponsor gave consistent oral evidence that, at the time of the hearing, the applicant was not working. Both explained that she was not permitted to work in Australia. The Tribunal notes that the applicant's movement records evidence that, on 5 February 2019, she was granted a Bridging E visa which included condition 8101 ('no work'). The representative told the Tribunal that the applicant had never been an unlawful non-citizen but rather she had had her Student visa cancelled.
35. The sponsor told the Tribunal that his wife's inability to work—despite her ability and desire to—was one of their 'big stresses'.
36. Both the applicant and the sponsor gave consistent oral evidence that, when she had been permitted to work in Australia, the applicant had worked as [an occupation 1]. Both gave consistent oral evidence about the name and location of the [business] where the applicant had last worked. The sponsor told the Tribunal that he had picked her up from the [business] on a couple of occasions.
37. They both also gave consistent oral evidence about the sponsor's work history, his current source of income and how, at the time of the hearing, they were both dependent upon that income. The sponsor told the Tribunal that, when he had met the applicant, he had had his own business in [industry] but that he had had to close his business when 'people went offshore'. Both persons told the Tribunal that the sponsor receives a pension and some rental income.
38. There is no evidence before the Tribunal that, either at the time of application or at the time of this decision, the applicant and the sponsor jointly owned or own real estate or other major assets; that they had or have any joint liabilities; or that one person in the relationship owed or owes any legal obligation in respect of the other.
39. Both the applicant and the sponsor explained that, when they married, the sponsor already owned his own home (this is the property currently being rented). The applicant explained that, as they both had their own personal bank accounts with the same named bank, after marrying, they had each added the other person to their existing account. The sponsor described the situation similarly, saying, 'the only reason no common bank account is because she had an account with the same bank already. I say, "here is the card, use it". She has access to whatever money she needs. She has the card'.
40. The applicant said that she did not have superannuation and she was unsure whether the sponsor did, saying that she had not inquired about this. The sponsor said that he did not have any superannuation because he had been self-employed and because monies had gone to his first wife after their divorce.
41. Both parties said that they did not have a will. The sponsor said that wills would be drawn 'down the track' as he wanted to ensure that both the applicant and her daughter were cared for.

42. With respect to the extent of any pooling of financial resources and any sharing of day-to-day household expenses, the applicant told the Tribunal that, when she had been working, she had worked part time only and that her income had not been high. She said that, for this reason, she had not contributed towards utilities but that she had contributed towards day-to-day food expenses. She said that, at present, she and her husband are not required to pay rent but that her husband does contribute towards the cost of the utilities (water, gas and electricity).
43. The sponsor told the Tribunal that, 'whatever she needs, I will look after her'.
44. He explained that, when the applicant had needed to buy a car, she had some savings but not the full amount needed. He said that he had given her some money so that she could buy the car outright. (The applicant gave a consistent account).
45. He said that, when the applicant had been working part time, he had not wanted her to contribute anything to the household but rather to send her earnings to help support her daughter in Vietnam.
46. He said that they lived a contented life, within a budget. He explained that they were currently living in a large property belonging to a friend of his and that 'what comes around, goes around', and that he had helped this lady in the past and that now she refuses to accept rent from them. He said that he does things around the property to help the lady, including contributing towards the utility bills. He said that their main expenses were for car registration, food and other things.
47. The Tribunal notes that very few documents were submitted in support of the parties' claims about the financial aspects of their relationship. The main evidence was correspondence addressed to the applicant from one car insurer, dated 26 July 2020 and another letter addressed to the applicant from a different car insurer, dated 16 June 2021. Notwithstanding, this does not trouble the Tribunal as it might in a different case. This is because the Tribunal found both the applicant and the sponsor to be very credible. Accordingly, the Tribunal accepts both parties' oral evidence about the financial aspects of their relationship, without the need for corroborating documentary evidence.
48. The Tribunal considers that the parties' financial arrangements are consistent with what would be reasonably expected of persons in their circumstances. The Tribunal is satisfied that the sponsor has shared his financial resources with the applicant as claimed. The Tribunal gives weight to this oral evidence.
49. The Tribunal gives some weight to the evidence of the financial aspects of the relationship.

50. *The nature of the household*

51. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are relevant matters to be considered when assessing the nature of the household.
52. There is no evidence before the Tribunal that the applicant and the sponsor have any children together.
53. The applicant has a daughter from her previous marriage, who lives in Vietnam. At the time of this decision, the child is aged [age] years. The applicant told the Tribunal that, at present, her daughter is in the care of her mother and step-father. She said that there was a communication barrier between the sponsor and her daughter but that he, like her, hopes to bring her daughter to Australia. She told the Tribunal that, earlier, her daughter had called

the sponsor 'papa' but that, later, her daughter had changed her mind and that she now calls him 'uncle'.

54. The sponsor told the Tribunal that the applicant speaks to her daughter every night. He said that he had met the applicant's daughter twice. He said that the first time was with the applicant. The Tribunal notes that the sponsor became emotional when recounting how he had asked the applicant what jewellery or gift he could buy her to mark the occasion of their wedding, and she had replied by saying that she would appreciate it if he could take her to Vietnam to see her daughter. At this stage of the hearing, upon hearing and seeing her husband in emotional distress, the applicant asked the presiding Member whether she could approach her husband to comfort him.
55. The sponsor told the Tribunal that the second time he had met the applicant's daughter was two years later, when the applicant had been unable to leave Australia because of her visa and he had travelled to Vietnam. (He explained that he has friends from his time working in the [specified] industry who were in Vietnam. He also said that he has the travel bug and given his advanced age, he had taken the opportunity to travel overseas when he was well enough to go even though this meant that he had gone on a few of trips without the applicant).
56. The Tribunal notes that there is one photograph showing the applicant, sponsor and the applicant's daughter together (presumably from the first trip) and a number of photographs of the sponsor with the applicant's daughter, including with a woman who the Tribunal assumes is the applicant's mother (presumably taken on the subsequent trip).
57. The sponsor has two children from his previous marriage, both of whom are adults. The applicant was able to tell the Tribunal their names and said that she had met them. In her own words, 'just say hello; no further talking'. The sponsor said that the applicant had met his children but that the socialising was not how he would like it to be. He said that he hoped that once the applicant was granted the visa and they went to live at his property, that they would be able to have his family over and that his children would be more accepting of the relationship as they would be able to see that he is happy.
58. The Tribunal accepts the evidence before it. The Tribunal finds that, at present, there is no evidence of any joint responsibility for the care and support of children. However, the Tribunal notes that this may change in the future as both the applicant and the sponsor would like the applicant's daughter to migrate to Australia and live with them.
59. With respect to the living arrangements of the persons, both the applicant and the sponsor gave consistent and credible oral evidence that they have lived together since a month before their wedding (the occasion where they signed the marriage certificate). They both told the Tribunal that they have lived together at different properties during that time. They both gave their current address in [Suburb 1], where they are living rent-free, and noted that for a period they had also lived at a property in [Suburb 2]. The sponsor gave the reasons why they had moved from [Suburb 1] to [Suburb 2] for a period, citing an issue that the applicant had with one of the other tenants at the [Suburb 1] property at the time.
60. The Tribunal notes that very few documents were submitted in support of the parties' claims about their living arrangements. In this case, this does not concern the Tribunal. The Tribunal is mindful that the parties claim to be living rent-free with a friend and accordingly there would be no formal lease agreement or utility bills addressed in their names. The Tribunal notes that the applicant has submitted a number of photographs showing her and the sponsor together in a domestic environment, showing the preparation of meals and birthday celebrations. As noted earlier, the Tribunal found both the applicant and the sponsor to be very credible. Their oral evidence did not appear to be rehearsed but rather appeared to be

natural. Each was able to provide further detail when asked to do so (or sometimes they added it themselves). In the circumstances, the Tribunal accepts the parties' consistent oral evidence about their living arrangements.

61. With respect to the responsibility for housework, both the applicant and the sponsor gave broadly consistent oral evidence about how they shared the responsibility for housework. With respect to cooking, they both acknowledged that they each cooked food according to their taste and preference, with the applicant preferring and cooking Asian cuisine and the sponsor preferring and cooking [specific European] cuisine. The applicant said that they ate together. The applicant said that the sponsor did most of the shopping although she said that sometimes they would go together. The sponsor said that he did the supermarket shopping at Coles whereas the applicant did the shopping for Vietnamese ingredients. Both acknowledged that the applicant did more cleaning than the sponsor and that the sponsor did more of the outside jobs. The applicant was able to detail the cleaning she undertook inside the home. In the sponsor's words, 'because she is not working, she doesn't let me do much'. Again, the Tribunal accepts the parties' oral evidence.

62. The Tribunal gives some weight to the evidence of the nature of the household.

63. *The social aspects of the relationship*

64. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.

65. The Tribunal asked both the applicant and the sponsor about any basis on which they plan and undertake joint social activities.

66. The applicant said that, after they had married, they had gone out together with the sponsor's friends, mentioning one occasion at a pub at [a named location]. She said that the sponsor talks to his friends in [Language 1], so she had not said much. She said that they had also socialised with her friends. She said that, during 'the COVID times', they had stayed home.

67. The sponsor acknowledged that they had not undertaken many joint social activities. When asked why not, he said that it was because they had not wanted to spend \$200–\$300 in restaurants when that money could be sent to the applicant's daughter. He said that they may go to a restaurant for a birthday.

68. He said that the applicant sees a couple of her girlfriends, naming two. He said that it was difficult for the couple to socialise with his friends because the age difference between him and the applicant was not well accepted by his friends' wives. He named his two friends who had been witnesses to the marriage ceremony and said that as these friends were divorced themselves, they were accepting of his marriage to the applicant. He said that he hoped that 'when things are normal' (possibly referring to the pandemic or possibly referring to when they live in his property), he hoped to have a BBQ and to invite all his friends and their wives and then they can 'take it or leave it' in terms of future socialisation with the couple.

69. When asked about any holidays that the couple has taken together, the applicant said that they had travelled to Vietnam after their marriage ceremony but that after that time, she had been prevented from travelling by her visa conditions and because of the COVID-19 pandemic travel restrictions.

70. The sponsor said that 'holidays are not our number one'. He said that they were worried that they could not bring 'our' little girl here. He said that their objective was to become a family. He said that holidays are a bonus. He stated that he would love to take the applicant to [Europe]. He also noted that he has been sick so that was another reason why there have been no holidays of late.
71. The Tribunal accepts both persons' credible oral evidence.
72. The Tribunal notes and gives weight to the photographs that were submitted showing the applicant and sponsor dining out together, including with others and in some photographs, in a location which the Tribunal assumes is Vietnam.
73. The sponsor gave credible oral evidence that, when he travelled to Vietnam, he had met the applicant's mother, father, daughter, some of the applicant's step-siblings and cousins.
74. It is difficult for the Tribunal to assess the opinion of the persons' friends and acquaintances about the nature of the relationship as no witnesses came to the hearing and no Form 888 statutory declarations or other statements were filed with the Department or with the Tribunal. In another case, this lack of third-party evidence may concern the Tribunal. However, in this case, it does not. The Tribunal accepts both the applicant's and the sponsor's credible oral evidence that they did not know that it would be beneficial to submit such statements. Both persons said that they were sure that they could obtain and submit such statements if they were provided time after the hearing. The Tribunal does not doubt this. The Tribunal also notes and accepts the sponsor's credible oral evidence that he had asked his good friends [named] (who were witnesses at the marriage ceremony) to give oral evidence at the hearing but that one was interstate and the other unavailable at that time.
75. Notwithstanding the lack of such third-party evidence, the Tribunal accepts the evidence before it—primarily photographs (including of two of the four witnesses at the marriage ceremony)¹ and the parties' credible oral evidence—that they do represent themselves to other people as being married to each other, albeit that their social circles are reasonably small. When asked, both persons told the Tribunal that some people in their social circles may not approve of the relationship because of the age difference. The applicant speculated that this may have been a reason why the sponsor's friends and family did not attend the Vietnamese wedding celebration.
76. The Tribunal gives some weight to the evidence of the social aspects of the relationship.
77. *The nature of the persons' commitment to each other*
78. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the persons' commitment to each other.
79. At the hearing, the applicant and the sponsor gave consistent, detailed and credible oral evidence about the inception and development of their relationship.
80. They said that they had met on Australia Day 2016 at the house in [Suburb 1] (their current home) when one of the applicant's friends, who was the niece of the property owner and living there at the time, had invited the applicant along to the party. They both said that, at the time, the sponsor was living at the property. Subsequently, they established a friendship -

¹ The applicant named all four witnesses when asked. She said that her friends [named] had acted as her witnesses and that the sponsor's friends [named] had acted as his witnesses. She said that she was no longer in contact with [one of them].

meeting for coffee, food, Vietnamese New Year celebrations and talking and texting on the phone. After a few months of friendship, on the occasion of the sponsor's birthday, the sponsor disclosed his feelings and the relationship commenced.

81. The sponsor said that he was mindful that the applicant was much younger than him but that he had developed strong feelings for her and that he wanted to marry her. He said that he tried to be romantic by proposing marriage on their one year anniversary of meeting - Australia Day 2017. Both parties told the Tribunal that the applicant had needed about two weeks to consider the proposal.
82. The applicant told the Tribunal that they did not have an engagement party because of the sponsor's 'high age' and it being her second marriage. However, she said that they had had a reception in Vietnam with about 20 people present so that all of her family could meet the sponsor.
83. The Tribunal noted that it did not have any photographs of that occasion and she said that could submit some. After the hearing, the Tribunal looked closely at the photographs that were submitted in response to the s 359(2) invitation, and it may be that some of the photographs that have already been submitted depict the reception in Vietnam.
84. The Tribunal questioned each party about their knowledge of the other (for instance, their interests, their closest friends and the composition of the applicant's family of origin) and their lives and is satisfied that they both demonstrated knowledge of each other's lives suggestive of a couple in a genuine and ongoing spousal relationship.
85. The Tribunal has taken into account the parties' respective ages, backgrounds and life experiences, and accepts that both at the time of application and at the time of this decision, neither party was nor is in a relationship with any third party. Both parties spoke frankly about their significant age difference, noting that the main issue that they need to counter is some resentment by the sponsor's family and friends. The sponsor said, 'when you're happy with someone, you don't count the years ahead. You count today and tomorrow'.
86. The Tribunal acknowledges the parties' claim about the duration of their committed relationship throughout the years and gives weight to evidence that, at the time of application on 10 May 2017, the parties had been married for a month and that, at the time of this decision, they have been married for over five years.
87. With respect to the length of time during which the persons have lived together, as noted earlier, the Tribunal accepts the parties' credible oral evidence and accordingly is satisfied that the parties have lived together as claimed.
88. With respect to the degree of companionship and emotional support that the persons draw from each other, the Tribunal asked the applicant if she could give an example of emotional support that she has received from the sponsor and extended to him. She said that the sponsor cares for her and is also very affectionate towards her daughter. She said that she loves him and lives with him. In her own words, 'that's all I can say'.
89. When the Tribunal asked these questions of the sponsor, he said that the applicant had supported him when he had been sick. He said that the applicant had taken him to hospital, cooked him soup and had been understanding of his situation and 'what the future holds'. (The Tribunal notes the medical evidence that was submitted to the Tribunal. The evidence is dated in mid-2021 and refers to the sponsor's [diagnosis], his need for surgery and his need for the support from his wife).

90. With respect to any emotional support that he provides to the applicant, the sponsor told the Tribunal that 'crying and stressing' were almost a hobby for the applicant and that 'she can't relax'. He said that he told her not to worry, to talk to her daughter every night and to be jubilant. He acknowledged that things had been very difficult for the applicant and that not being able to work had made her feel useless and hopeless. He said that it was difficult for him to 'prop her up' but that 'we try our best to prop up each other'.
91. With respect to whether the parties see their relationship as being for the long-term, the applicant told the Tribunal that she did see it in those terms. She said that this was her second marriage and that she wants to live her life with the sponsor. In her own words, 'I commit to the long-term relationship'. The sponsor said that he wanted to die with the applicant in his life—whether that be 'in a year or 10 or 20'. He said that he had been married once before and that his marriage with the applicant was the one that he wants to be his last.
92. The sponsor detailed the couple's plan for the future. He said that they had had this plan for years but that the visa refusal had frustrated it to date. He said that the applicant could earn a good income and that he wanted to re-open his business. He said that with such income, they would be able to live in his house rather than rely on renting it out for income. He said that they wanted to bring the applicant's daughter to Australia and create a better future for the child. He described it as 'a very simple and achievable plan'.
93. The applicant gave consistent oral evidence. When asked, both parties gave the address of the sponsor's property.
94. The Tribunal notes that, towards the end of the hearing, the applicant broke down and cried when reflecting on how long she had been waiting for a visa and her distress at not having been able to see her daughter for so many years.
95. Having reflected on the evidence before it, the Tribunal finds that both at the time of application and at the time of this decision, the parties provided and continue to provide companionship and emotional support to each other and that they view their relationship as being for the long term.
96. The Tribunal places great weight on the evidence of the nature of the persons' commitment to each other.
97. **CONCLUSION**
98. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s 5F(2)(a) of the Act.
99. After considering all the evidence before it and for the reasons given with respect to the reg 1.15A(3) matters, the Tribunal is satisfied that, both at the time of application on 10 May 2017 and at the time of this decision, the applicant and the sponsor:
- had and have a mutual commitment to a shared life as wife and husband to the exclusion of all others, as required by s 5F(2)(b) of the Act;
 - had and have a genuine and continuing relationship, as required by s 5F(2)(c) of the Act; and
 - lived and live together as required by s 5F(2)(d)(i) of the Act.

100. Given these findings, the Tribunal is satisfied that, at the time the visa application was made and at the time of this decision, the parties were and are in a spousal relationship.
101. However, the spouse requirement in cl 820.211(2)(a)(i) is not the only requirement in cl 820.211(2) which must be satisfied at the time of application. The sponsorship requirements in cl 820.211(2)(a)(ii) and cl 820.211(2)(c) must also be satisfied, and, if the applicant was not the holder of a substantive visa at the time of application, then the requirements in cl 820.211(2)(d) must also be satisfied.
102. The Tribunal has reviewed the record of responses for the application for the visa which is on the Department's file. Unfortunately, the Department's file does not contain a copy of the *Form 40SP—Sponsorship for a partner to migrate to Australia*. However, the Tribunal is in no doubt that the sponsor would have completed such a form. Indeed, the primary decision states that the sponsor had lodged a sponsorship in support of the application.
103. From the evidence before it, the Tribunal is satisfied that the applicant is sponsored by the sponsor and that cl 820.211(2)(c)(i) is met. There is no information before the Tribunal to suggest that the circumstances outlined in cl.820.211(2B) apply so the Tribunal finds that the sponsor is not prohibited by that subclause from being a sponsoring partner. Accordingly, the Tribunal finds that cl 820.211(2)(a)(ii) is met.
104. The applicant's movement records evidence that, on 26 March 2016, she was granted a Subclass 573 Student (Class TU) visa. She held this substantive visa upon applying for the Partner (Temporary) (Class UK) Subclass 820 visa on 10 May 2017. As she held a substantive visa at the time of application, the further requirements in cl 820.211(2)(d) need not be met.
105. The Tribunal finds that the applicant meets the time of application requirements in cl 820.211(2). As the applicant meets the requirements of cl 820.211(2), she also meets cl 820.211(1)(b). As both cl 820.211(1)(a) and (b) are met, cl 820.211(1) is met.
106. With respect to criteria to be satisfied at the time of decision, the Tribunal finds that the applicant continues to meet the requirements of cl 820.211(2) and so meets cl 820.221(1)(a).
107. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
108. Given the circumstances in which the sponsor is [age] years of age and in his words, five years of their lives have already been wasted and plans put on hold by the processing of the application for the visa and where the applicant is very keen to be able to work in Australia and to make plans to see her daughter—a minor—presently who is living in Vietnam, any efforts the Department of Home Affairs may make in expediting this case would be appreciated.

DECISION

109. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(1) of Schedule 2 to the Regulations
 - cl 820.221(1)(a) of Schedule 2 to the Regulations

Justine Clarke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).